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No. 84-28 and 84-143
CONSOLIDATED

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1984

No. 84-28

DONALD C. BROCKETT,

Appellant,

v.

SPOKANE ARCADES, INC., et al.,

Appellees.

No. 84-143

KENNETH EIKENBERRY, in his official capacity as Attorney General for the State of Washington, et al.,

Appellants,

v.

J-R DISTRIBUTORS, INC., et al.,

Appellees.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT APPENDIX

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APPEAL DOCKETED JULY 3, 1984
PROBABLE JURISDICTION NOTED OCTOBER 1, 1984

STATE PRINTING PLANT 3 OLYMPIA, WASHINGTON

80PP

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*Appellees J-R Distributors, Inc. and Spokane Arcades, Inc. are listed because they are included in the captions and representative of the case. There is no intent to exclude the other plaintiffs, namely: Azure Entertainment Corporation of Washington; Jack R. Burns, in his representative capacity as Executor of the Estate of Selom F. Burns; Playtime Theatres, Inc., a Washington Corporation; Kukio Bay Properties, Inc., a Washington Corporation; The American Civil Liberties Union of Washington; Madrona Publishers, Inc., Superior Publishing Company; Washington Library Association; Pacific Northwest Booksellers Association; Motion Pictures Exhibitors of Washington, Alaska and Northern Idaho; Washington State Council of Teachers of English; Washington Library Media Association; and The Community College Librarian and Media Specialists Association of Washington. This procedure is used only in the interest of brevity.

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UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON

C-82-223-RJM Spokane Arcades, Inc. vs. The Honorable Kenneth Eikenberry, et al.

Date	NR.	Proceedings
1982		
Apr 2	1	COMPLAINT For Declaratory Judgment and Preliminary and Permanent Injunction Issued Summons
5	2	MOTION For Temporary Restraining Order
5	3	ORDER To Show Cause Why Temporary Restraining Order Should Not Issue (RJM) (defts to appear & show cause on 4/8/82 @ 1:30 p.m.) cc: Atty Doug Harris
6	4	NOTICE OF APPEARANCE (Deft Eikenberry)
*8	5	ADDITIONAL AUTHORITIES in Support of Motion For Temporary Restraining Order
8	6	APPLICATION For Permission to Participate
8	7	ORDER (Robert Eugene Smith granted permission to participate as counsel in this case) (RJM) cc: Atty Burns
9	8	SUMMONS — served Brockett and Sloane
13	9	MEMORANDUM & ORDER (deft shall bring no action under this legislation until determination on the merits; pltfs brief due 5/3/82; defts' response 5/18 & hearing set 6/7/82) (RJM) cc: Attys Burns, Atty Gen, Spokane & Olympia; Brockett & Sloane

Date	NR.	Proceedings
*8	—	HEARING RE: Preliminary Injunction S/RJM
16	10	AFFIDAVIT of Mailing (#4)
22	11	NOTICE of Appearance (Deft Brockett)
22	12	DEFT'S ANSWER to Pltf's Complaint (Brockett)
22	13	AFFIDAVIT of Mailing (#11,12)
26	14	NOTICE of Appearance (Deft Sloane)
27	15	AFFIDAVIT of Service (#1,2,3 to ATG)
30	16	DEFT EIKENBERRY'S ANSWER to Pltf's Complaint
May 3	17	CONSOLIDATED MEMORANDUM of Authorities in Support of Pltfs' Complaints for Declaratory Judgment
3	18	DEFT EIKENBERRY'S FIRST REQUEST For Production of Documents
18	19	CONSOLIDATED MEMORANDUM Of Authorities in Opposition to Pltf's Complaints for Declaratory Judgment and for Injunctive Relief (Deft City)
18	20	CONSOLIDATED MEMORANDUM of Authorities in Response to Pltfs' Memorandum (Deft State)
18	21	MEMORANDUM of Authorities (Deft Brockett)
Jun 1	22	PLTF'S OBJECTION to Deft Eikenberry's First Request For Production of Documents
7	—	NON-JURY TRIAL S/RJM Court's determination: Under Advisement
9	23	ORDER Granting Pltfs' Motion For Shortening Time & Denying Motion to Strike (RJM) cc: Attorneys

Date	NR.	Proceedings
2	24	CONSOLIDATED MOTION & AFFIDAVIT in Support of Consolidated Motion to Strike & Request For Oral Argument
2	25	CONSOLIDATED MEMORANDUM of Authorities in Support of Pltfs' Motion to Strike
2	26	CONSOLIDATED MOTION For Order Shortening Time
2	27	CERTIFICATE of Service (#24,25,26)
15	28	DEFT DONALD C. BROCKETT'S POST TRIAL MEMORANDUM
16	29	CERTIFICATE of Service (#28)
Jul 2	30	ORDER OF CONSOLIDATION (C-82-223, C-82-230, C-82-231, C-82-239, C-82-240, C-82-283 & C-82-354 consolidated) (RJM) cc: Attorneys
2	31	MEMORANDUM DECISION (pltf's prayer for injunctive relief is denied) (RJM) cc: Attys
20	32	CONSOLIDATED MEMORANDUM in Opposition of Stay (Deft)
21	33	CERTIFICATE of Service (re #32)
23	34	ORDER (RJM) (exhibits 1 thru 11 admitted) cc: attys
26	35	ORDER (RJM) (denying pltfs' prayer for injunctive relief; dismissing action; granting pltfs' motion for stay pursuant to Rule 6(i) of 9CCA rules; said stay to remain in effect until 9CCA either grants or denies application) cc: attys COB-
26	36	JUDGMENT on Decision by the Court (that judgment is entrd denying pltfs' prayer for injunctive relief; action is dismissed; pltf's motion for stay is

Date	NR.	Proceedings
		granted upon condition that application for stay pending appeal be made to 9CCA pursuant to Rule 6(i) of 9CCA rules; said stay to remain effective until 9CCA either grants or denies application) cc: attys COB-41-209
29	37	MOTION To Alter or Amend Judgment (Pltf)
Aug 11	38	ORDER (pltf's motion to amend the judgment is denied) (RJM) cc: Attorneys
Sep 10	39	NOTICE OF APPEAL (pltf) cc's 9CCA, Attys Burns & Smith, A.G., attys Brockett & Robinson
Sep 13	40	COPY 9CCA Docket Fee Payment Notification Form — ($5 Clerk's fee and $65 9CCA fee paid) — original forwarded to 9CCA
13	—	Forwarded original Case Information Sheet and copy of docket entries to 9CCA
Oct 1	41	DESIGNATION of Reporter's Transcript (pltf atty Burns) cc's attys Burns, Smith, Gregoire, Brockett & Robinson; Ct Rptr Lenhart
1	42	NOTICE of Designation of Transcript (pltf atty Burns)
Nov 1	43	REPORTER'S TRANSCRIPT (6-07-82 S/RJM) (Lenhart)
1	44	COPY 9CCA CERTIFICATE of Record — original forwarded to 9CCA
29	45	COPY 9CCA ORDER (appellee's motion to consolidate is granted)
Dec 15	46	COPY 9CCA ORDER (applnts granted extension to 1-05-83 to file opening brief)

Date	NR.	Proceedings
20	47	COPY 9CCA ORDER (applnts granted extension to 1-05-83 to file opening brief) (applnts Burns, Playtime Theatres, Kukio Bay, & Spokane Arcades)
27	48	DESIGNATION of Clerk's Record — (pltf atty Burns) cc's 9CCA, attys Burns, Gregoire, Brockett & Robinson
1983		
Jan 17	49	COPY 9CCA ORDER (applnts granted extension thru 1-19-83 to file opening brief)
Feb 7	50	COPY 9CCA ORDER (no oversized brief; no further extensions; appellees request for costs denied; Wash. Publications Distributors Assoc. granted to be amicus curiae)
Mar 10	51	DESIGNATION of Clerk's Record (appellees A.G.) cc's 9CCA, attys Burns, Smith, Brockett, Robinson & A.G. Gregoire
Apr 6	52	COPY 9CCA ORDER (Applnt's motion to strike from record on appeal "Appendix I" attached to A.G.'s Consolidated Memorandum of Authorities, is granted)[1]
May 5	—	FORWARDED Record on Appeal to 9CCA

[1]This entry is in error. The District Court on June 8, 1982 denied the Motion to Strike.

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON

C-82-230-RJM J-R Distributors, Inc. vs. Kenneth Eikenberry, et al.

Date	NR.	Proceedings
1982		
Apr 6	1	COMPLAINT For Declaratory and Injunctive Relief Pursuant to Federal Civil Rights Act, 42 USC 1983 — Issued Summons
6	2	MEMORANDUM of Points & Authorities in Support of Temporary Restraining Order and Preliminary Injunction
8	3	NOTICE Of Appearance (Deft Sullivan)
8	4	MEMORANDUM Of Points & Authorities in Opposition to Temporary Restraining Order & Preliminary Injunction on Behalf of Deft Jeffrey C. Sullivan
8	—	HEARING RE REQUEST FOR TRO & PRELIMINARY INJUNCTION (S/RJM)
8	5	SUMMONS — served Defts ATG, County & City
8	6	NOTICE of Appearance (re Deft ATG)
8	—	HEARING RE PRELIMINARY INJUNCTIONS (S/RJM)
13	7	MEMORANDUM AND ORDER (RJM) (deft shall bring no action under this legislation until determination on the merits; pltfs brief due 5/3/82; defts' response 5/18/82; and hearing set 6/7/82) cc: Attys Maxey, Brown-Weston, Atty Gen., Spokane & Olympia; Brockett, Sloan, Sullivan & Andrews

Date	NR.	Proceedings
26	8	NOTICE of Appearance for James Sloane
26	9	NOTICE of Appearance (re Deft Brockett)
26	10	DEFENDANT'S ANSWER to Plaintiff's Complaint (Deft Brockett)
26	11	AFFIDAVIT of Mailing (re #9 & 10)
30	12	DEFT EIKENBERRY'S ANSWER to Plaintiff's Complaint
May 3	13	DEFT EIKENBERRY'S FIRST REQUEST for Production of Documents
13	14	MEMORANDUM of Points and Authorities in Opposition to Declaratory Judgment on Behalf of Deft Jeffrey C. Sullivan
18	15	MOTION for Sanctions by Court for Pltf's Failure to Comply with Court Order (Deft Eikenberry)
18	16	MEMORANDUM in Support of Motion for Sanctions by Court for Pltf's Failure to Comply with Court Order (Deft Eikenberry)
18	17	NOTICE Setting Date and Place of Hearing on Motion (re #15)
18	18	AFFIDAVIT of Mailing (re #15, 16 & 17)
21	19	MOTION to Permit Plaintiffs' Original Brief to be Deemed Their Brief for Trial on the Merits
21	20	CONSOLIDATED MEMORANDUM of Pltfs J-R Distributors, Inc. and Azure Entertainment Corporation of Washington in Opposition to Defts' Motion for Sanctions by Court for Pltfs' Failure to Comply with Court Order
21	21	AFFIDAVIT of Mailing (re #19 & 20)

Date		NR.	Proceedings
Jun	3	22	CONSOLIDATED REPLY MEMORANDUM of Pltfs J-R Distributors, Inc., and Azure Entertainment Corporation of Washington
	3	23	DEFENDANTS' ANSWER to Pltfs' Complaint (Deft Sullivan & Andrews)
	7	—	NON-JURY TRIAL ON MERITS (S/RJM) Advisement
	7	24	AFFIDAVITS of Service (re #22)
	9	25	ORDER Denying Defts' Motion for Sanctions and Granting Pltfs' Motion to Permit Pltfs' Original Brief to be Deemed Their Brief for Trial on the Merits (RJM) cc: attys
	11	26	CONSOLIDATED POST TRIAL MEMORANDUM of Pltfs J-R Distributors, & Azure Entertainment Corporation of Washington
	14	27	AFFIDAVITS of Service (re #26)
	15	28	DEFT DONALD C. BROCKETT'S POST TRIAL MEMORANDUM
	15	29	CONSOLIDATED MEMORANDUM in Response to Pltf's Post Trial Memorandum
July	2	30	ORDER OF CONSOLIDATION (RJM) (C-82-223, C-82-230, C-82-231, C-82-239, C-82-240, C-82-283 and C-82-354 are consolidated) cc: attys
	2	31	MEMORANDUM DECISION (RJM) (denying plaintiffs' prayer for injunctive relief) cc: attys
	20	32	CONSOLIDATED MEMORANDUM in Opposition of Stay (Deft)
	21	33	CERTIFICATE of Service (Re #32)
	23	34	ORDER (RJM) (exhibits 1 thru 11 admitted) cc: Attys

Date	NR.	Proceedings
26	35	ORDER (RJM) (denying pltfs' prayer for injunctive relief; dismissing action; granting pltfs' motion for stay pursuant to Rule 6(i) of 9CCA rule; said stay to remain in effect until 9CCA either grants or denies application) cc: attys COB-41-208
July 26	36	JUDGMENT on Decision by the Court (that judgment is entrd denying pltfs' prayer for injunctive relief; action is dismissed; pltf's motion for stay is granted upon condition that application for stay pending appeal be made to 9CCA pursuant to Rule 6(i) of 9CCA rule; said stay to remain effective until 9CCA either grants or denies application) cc: Attys COB-41-210
29	37	MOTION to Alter or Amend Judgment (pltf)
30	38	NOTICE OF APPEAL (pltf) cc: 9CCA, Attys Garrou, Maxey, Sullivan, Robinson, Andrews, Brockett & Atty Gen
30	39	COPY 9CCA Docket Fee Payment Notification Form — ($5 Clerk's fee & $65 9CCA fee paid) — original forwarded to 9CCA
30	—	Forwarded original Case Information Sheet and copy of docket entries to 9CCA
Aug 11	40	ORDER' (pltf's motion to amend the judgment is denied) (RJM) cc: Attorneys
16	41	COPY 9CCA ORDER (82-3441 & 82-3442 consolidated)
Oct 1	42	NOTICE of Designation of Transcript (pltf atty Burns)

Date	NR.	Proceedings
15	43	COPY 9CCA ORDER (applnt's 8-02-82 motion for stay or injunction pending appeal is granted; d.c.'s stay of decision will remain in force during pendancy of this appeal)
15	44	DESIGNATION of Reporter's Transcript (pltf-applnt atty Brown) cc's attys Brown, Maxey, Sullivan, Robinson & Brockett, and Ct Rptr Lenhart; cc's to atty Andrews and Att Gen
Nov 1	45	REPORTER'S TRANSCRIPT (6-07-82 S/RJM) Lenhart (#43 C-82-223)
1	46	COPY 9CCA CERTIFICATE of Record — original forwarded to 9CCA
29	47	COPY 9CCA ORDER (appellees' motion to consolidate is granted)
Dec 15	48	COPY 9CCA ORDER (applnts granted extension to 1-05-83 to file opening brief)
Dec 20	49	COPY 9CCA ORDER (applnts granted extension to 1-05-83 to file opening brief) (applnts Burns, Playtime Theatres, Kukio Bay Properties & Spokane Arcades)
1983		
Jan 17	50	COPY 9CCA ORDER (applnts granted extension thru 1-19-83 to file opening briefs)
24	51	DESIGNATION of Clerk's Record (applnts) ccs 9CCA, 7 attys
Feb 7	52	COPY 9CCA ORDER (no oversized brief; no further extensions; appellees request for costs denied; Wash. Publications Distributors Assoc. granted to be amicus curiae)

Date	NR.	Proceedings
Mar 10	53	DESIGNATION of Clerk's Record (appellees A.G.) cc's attys Maxey, Brown, Sullivan, Robinson, Brockett, A.G. Gregoire and 9CCA
Apr 6	54	COPY 9CCA ORDER (Applnt's motion to strike from record on appeal "Appendix I" attached to A.G.'s Consolidated Memorandum of Authorities, is granted)[2]
May 5	—	FORWARDED Record on Appeal to 9CCA

[2]This entry is in error. The District Court on June 8, 1982 denied the Motion to Strike.

UNITED STATE DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

NO.

COMPLAINT FOR DECLARATORY JUDGMENT AND PRELIMINARY AND PERMANENT INJUNCTION

SPOKANE ARCADES, INC., a Washington Corporation,
Plaintiff,

vs.

THE HONORABLE KENNETH EIKENBERRY, as Attorney General of the State of Washington, in his representative capacity only; DONALD C. BROCKETT, Prosecuting Attorney of Spokane County, in his representative capacity only; and JAMES SLOANE, Spokane City Attorney, in his representative capacity only,
Defendants.

COMES NOW, Spokane Arcades, Inc., a body corporate of the State of Washington, by and through its attorneys, Jack R. Burns, Robert Eugene Smith and Arthur M. Schwartz, and seeks a declaratory judgment, as well as a preliminary and permanent injunction, with respect to the State of Washington *Engrossed Substitute House Bill 626*, (hereinafter referred to as "H.B. 626"); and in support of their cause of action, state:

I. JURISDICTION

1. This is a civil action whereby plaintiff prays for a preliminary and permanent injunction enjoining defendants and each of them from in any way attempting to enforce the provisions of H.B. 626, a copy of which is attached hereto as Exhibit "A" in support of this complaint, the contents of which are incorporated herein by

reference; on the grounds that H.B. 626 is unconstitutional as written, and as the same is threatened to be applied to the plaintiff in the case at bar. Further, plaintiff prays for a declaratory judgment to determine the constitutionality of said H.B. 626. The allegations to be set forth in the premises establish that there are presented questions of actual controversy between the parties involving substantial constitutional issues in the said statute as written and/or in its potential threatened application and as such is repugnant to the rights of the plaintiff herein under the First, Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the Constitution of the United States.

2. Jurisdiction is conferred on this Court for the resolution of the substantial constitutional questions presented by the provisions of 28 USCA §1331(A) which provides in pertinent part:

> (A) The District Courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000.00, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

as well as 28 USCA §1343(3), which provides in pertinent part that the District Courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

> To redress the deprivation, under color of any state law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States * * *

and the organic law which further authorizes the institution of this suit founded on 42 USCA §1983, which provides in pertinent part as follows:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any state or territory subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution

> and the laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Prayer for declaratory relief is founded on Rule 57 of the Federal Rules of Civil Procedure, as well as 28 USCA §2201, which provides in pertinent part:

> * * * any Court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought * * *

The jurisdiction of this Court to grant injunctive relief is conferred by 28 USCA §2202, which provides:

> Further necessary or proper relief based on a declaratory judgment or decree may be granted after reasonable notice and hearing against any adverse party whose rights have been determined by such judgment.

The provisions of Rule 65 of the Federal Rules of Civil Procedure, providing for a preliminary and a permanent injunction, further authorize this Court to grant injunctive relief consistent with the procedures set forth therein.

II. PARTIES

3. The Honorable Kenneth Eikenberry is named in his capacity as a person under the new section three of H.B. 626 who may bring an action for maintaining a moral nuisance.

4. Donald C. Brockett is named in his capacity as a person under the new section three of H.B. 626 who may bring an action for maintaining a moral nuisance, and who also may initiate an information under the new section eight.

5. James Sloane is named in his capacity as a person under the new section three of H.B. 626 who may initiate an action for maintaining a moral nuisance.

6. Spokane Arcades, Inc., a body corporate of the

State of Washington, operates three bookstores in the State of Washington, City of Spokane, located at: 309 W. Riverside; 325 W. 2nd; and 1125 W. 1st; respectively. These stores offer for sale books and magazines to the interested public as well as operating an Arcade on the premises, which permits exhibition of motion picture films in machines that are coin operated.

III. FACTUAL ALLEGATIONS

7. That no criminal, quasi-criminal and/or other civil proceeding is pending in any of the State Courts in the State of Washington against the plaintiff, its agents, servants and employees, seeking a penalty for maintaining a moral nuisance or charging the crime of promoting pornography under the provisions of H.B. 626, as of the date of filing of this suit. That should a lawsuit be filed in one or more of the State Courts of the State of Washington, by the Attorney General of this State or any Prosecuting Attorney, City Attorney, or City Prosecutor, to secure a penalty for maintaining a moral nuisance or committing the crime of promoting pornography, the same would still be within the jurisdiction of the United States District Court under an exemption recognized in *Younger v. Harris*, 401 U.S. 3727 L.Ed.2d, 669, 91 S.Ct. 746 (1971); which exception does not bar a federal district court from intervening when a state civil proceeding is pending and/or when one is brought after the initiation of the federal suit because H.B. 626 may fairly be characterized as "flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph and whatever manner and against whomever an effort may be made to apply it."

8. H.B. 626 which passed by a vote of a majority of both Houses of the Washington State Legislature and is to become law when signed by the Governor, may be characterized as "flagrantly and patently violative of express constitutional provisions" both in general theory as it constitutes a prohibited prior restraint which is repugnant

to the First Amendment to the Constitution of the United States as made applicable to the State under the Fourteenth Amendment as well, the respective provisions thereof are also constitutionally deficient in both substance and procedure and violative of express constitutional guarantees under the First, Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the Constitution of the United States.

9. The plaintiff is engaged in the business of exhibiting for commercial purposes, motion picture films and/or offering for sale books and magazines to the interested adult public of sexually oriented press materials presumptively protected by the First Amendment to the Constitution of the United States. *Heller v. People of the State of New York*, 413 U.S. 483 (1973); *Roaden v. Commonwealth of Kentucky*, 413 U.S. 496 (1973).

10. The purpose and scheme of H.B. 626, if it were to become law, is to enable the Attorney General and any Prosecuting Attorney, City Attorney, or City Prosecutor of this State to bring an action to effectively close any book store, theatre or arcade offering for sale to the interested adult public, sexually oriented press materials by reason of the imposition of exorbitant fines.

11. Plaintiff affirmatively alleges that the entire statutory scheme designed to be reached by H.B. 626, as it applies to the plaintiff, or is threatened to be applied to the plaintiff should the same become law, is constitutionally deficient and constitutes a prohibited prior restraint in violation of the plaintiff's rights under the First, Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the Constitution of the United States, as well as the rights of the adult citizens and adult visitors to this State to their respective constitutional rights to have access to such sexually oriented press materials. Under Section two of H.B. 626, the following are declared to be moral nuisances:

1. Any and every place in the State where lewd films are publicly exhibited as a regular course of busi-

ness, or possessed for the purpose of such exhibition;

2. Any and every place in the State where lewd film is publicly exhibited, or possessed for such purpose at a place which is a moral nuisance under this section;
3. Any and every place of business in the State in which lewd publications constitute a principal part of the stock in trade;
4. Every place which, as a regular course of business, is used for the purpose of lewdness or prostitution, and every such place in or upon which acts of lewdness or prostitution are conducted, permitted, carried on, continued, or exist.

12. That the proposed statutory scheme is a blatant prohibited prior restraint and would constitute a denial of the plaintiff's First, Fourth, Fifth, Sixth and Fourteenth Amendment rights as guaranteed to it under the Constitution of the United States, in the following respects:

A. Plaintiff, in order to continue operation, would have to become a self-censor and as such, this would constitute a chilling effect upon free speech.
B. Plaintiff would have to make its own individual determination as to whether or not the material sold or exhibited at its respective establishments violates the definition of what is lewd matter as contained in H.B. 626, which, parenthetically speaking, *does not* track the permissible definition of what constitutes obscene press materials and is without the ambit of the First Amendment as set forth by the majority of the Supreme Court of the United States in the case of *Miller v. California*, 413 U.S. 15 (1973).

13. Plaintiff affirmatively alleges that H.B. 626 is patently unconstitutional on its face and the effect of enforcement thereof would preclude plaintiff and others similarly situate from selling, exhibiting and/or offering for sale press materials which are presumptively protected under the First Amendment to the Constitution of the United States.

14. That interested adult citizens of the State of Washington as well as interested adult visitors to the State of Washington will be denied their First Amendment rights to receive and have access to sexually oriented press materials by the statutory scheme envisioned by H.B. 626 for reasons having to do with vagueness, overbreadth, prior restraint, and the taking of a property interest without due process of law.

15. Plaintiff affirmatively alleges that the potential chilling effects caused by the overly broad and vague definition of lewd matter and the exorbitant fines would be so pervasive that, in effect, it would be a total bar to plaintiff's selling, distributing or exhibiting, as well as citizens and visitors of the State of Washington from purchasing or viewing, presumptively protected press materials, including, but not limited to: newspapers, magazines, periodicals, printed books and motion picture film; all of which are presumptively protected by the First Amendment to the Constitution of the United States.

16. That the passing into law of H.B. 626 will require the plaintiff to engage in self-censorship in an effort to preguess and predetermine what in effect will affront the contemporary community standards of the State of Washington, what appeals to the prurient interests of the average person of the State of Washington, what press materials, when considered as a whole, and in the context in which they are used, possess literary, artistic, political or scientific value, all of which determinations must be made in advance by plaintiff and others similarly situated, on a subjective basis in order to avoid the closing of the facilities operated by them and attempt to preserve and protect their rights to remain in existence in said state and offer to the interested adult public presumptively protected press materials.

17. The threat of unlimited fines against a theatre or other facility which offers for sale presumptively protected press materials on the basis of an over-expansive definition of lewd matter, is a very serious form of censorship and has

a chilling effect on the First Amendment rights of plaintiff and others similarly situate, as well as citizens and visitors to the State of Washington who desire to view sexually explicit motion picture film fare and/or purchase books or magazines or periodicals at any of the business locations operated by the plaintiff and others similarly situate.

18. Plaintiff alleges that it is entitled to declaratory relief in this matter in order to avoid the necessity of having to act at its peril or to act upon its own interpretation of what rights are available to it or in the alternative, to abandon its rights because of the fear of incurring damages and losses in multiple lawsuits.

IV. BASIS FOR RELIEF

19. H.B. 626 is clearly repugnant to the First, Fourth, Fifth, Eighth and Fourteenth Amendments to the Constitution of the United States, as written, and as threatened to be applied for the following reasons:

A. Said H.B. 626 is void for vagueness in that if fails to establish by its terms definitive standards, criteria and/or other controlling guides defining words like "moral nuisance" or "lewd matter" and offers a definition of what is obscene which is at variance with the definitional standards set forth by the United States Supreme Court in *Miller v. California, supra*, and as such would violate plaintiff's rights to due process under the Fifth Amendment and Fourteenth Amendment to the Constitution of the United States.

B. H.B. 626 is void for impermissible overbreadth by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms in that the same sets forth standards at variance with those minimum standards proscribed by the Supreme Court of the United States, in connection with the exercise of First Amendment rights.

C. Said H.B. 626 is further void in that the same, by

its terms, places an impermissible burden upon the exercise of plaintiff's First Amendment rights, and has a chilling effect on such freedoms.

D. Said H.B. 626 is further void as violative of the Equal Protection Clause of the Fourteenth Amendment, in that the same creates a statutory classification which has no rational relationship to a valid public purpose nor is the same necessary to the achievement of a compelling state interest by the least drastic means.

E. Said H.B. 626 is repugnant to the substantive due process provision of the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States because the same permits deprivation of liberty and/or property interests for the exercise of First Amendment rights by unreasonable, arbitrary and capricious means without a showing of a real and substantial relationship to any state subordinating interest which is compelling to justify state action limiting the exercise by plaintiff of its First Amendment freedoms.

F. Said H.B. 626 is impermissibly overbroad and repugnant to the procedural due process requirements of the Fifth and Fourteenth Amendments to the Constitution of the United States, in that the same employs means lacking adequate safeguards which due process demands to assure non-obscene materials sought to be distributed to an interested adult public as an ongoing business activity, the constitutional protection of the First Amendment, to which said materials are entitled.

G. Said H.B. 626 is vague and impermissibly overbroad and, thus, repugnant to the First, Fourth, Fifth, Eighth, and Fourteenth Amendments to the United States Constitution, in that said H.B. 626, by its provisions, permits inherent powers of censorship and suppression constituting a prior re-

straint on the exercise of plaintiff's First Amendment rights.

20. The particular sections of H.B. 626 are clearly repugnant to the First, Fourth, Fifth, Eighth and Fourteenth Amendments to the Constitution of the United States, as written, and as threatened to be applied for the following reasons:

A. Said H.B. 626 and, in particular, Section 1 as it purports to define knowledge, creates an impermissible presumption that certain matter is patently offensive.

B. (1) Said H.B. 626 and in particular, Section 1(2)(b), purports to define certain standards for determining what is obscene and contains the following language:

> "Which explicitly depicts or describes patently offensive representations or descriptions of"

whereas the United States Supreme Court, in setting forth standards which may be used by states to prohibit obscene material either on a civil or criminal basis in the case of *Miller V. California, supra*, has worded the definition this way:

> "Whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state laws;"

This language creates an impermissible presumption that certain acts or depictions are patently offensive.

(2) A further part of the definition of lewd matter found in this section reads:

> "(c) which, when considered as a whole, and in the context in which it is used, lacks serious literary artistic, political or scientific value."

The United States Supreme Court in the Miller Test used the definition "whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value." The departure from the stand-

ards approved by the United States Supreme Court, in *Miller v. California*, *supra*, thus renders those words and the variances of H.B. 626 to be void for vagueness in violation of plaintiff's First Amendment rights.

D. Said H.B. 626 and, in particular, Section 1(2)(b)(iii), is void for impermissible overbreadth in that it includes within its definition violent or destructive acts of human or animal mutilation or dismemberment.

E. Said H.B. 626 and, in particular, Section 1(3), purports to include within its definition of obscene all those meanings which its definition of obscene all those meanings which the word "lewdness" has under the common law. This expansion from the standards approved in *Miller v. California*, *supra*, renders the definition void for vagueness.

F. Said H.B. 626 and, in particular, Section 1(8), departs from the definition in *Miller v. California*, *supra*, of prurient as a "shameful or morbid interest in sex" and as such renders the definition void for vagueness.

G. Said H.B. 626 and, in particular, Section 2(1), is void for vagueness and overbreadth in that it fails to define "as a regular course of business".

H. Said H.B. 626 and, in particular, Section 2(3), is void for vagueness and overbreadth in that it fails to define "principal part of the stock in trade".

I. Said H.B. 626 and, in particular, Section 2(4), is void for vagueness and overbreadth in that it fails to define "regular course of business" and it brings within the prohibition and sanctions of the act, places where a single act of lewdness, whether criminal or not, has occurred.

J. Said H.B. 626, in particular, Section 4(2), is void for vagueness in that it allows a penalty of unlimited and indeterminate amount. Said section is violative of the First, Fourth, Fifth, Eighth and

Fourteenth Amendments to the Constitution of the United States and has the effect of not only chilling but silencing protected speech. Said section is also void for vagueness and violative of plaintiff's rights under the Fourteenth Amendment in that the consideration of "willfulness" and of "profits" renders its application as to the amount of penalty uncertain.

K. Said H.B. 626 and, in particular, Section 5, is void in that it creates an open invitation to city's to commence vexatious and harassing litigation in order to fatten their own treasuries.

L. Said H.B. 626 and, in particular, Section 8, is unconstitutionally vague and overbroad in the following particulars:

(1) Said section incorporates that definition in Section 1 of "knowledge" which includes an erroneous presumption that the material within the lewd matter is patently offensive;

(2) Said section is unconstitutionally vague and overbroad in that it uses as its definition of obscene matter, the over-expansive definition of Section 1;

(3) Said section is unconstitutionally vague and overbroad in that it creates the crime of "promoting pornography". All pornography is not obscene. The mere charging of the crime will insure a conviction because the name of the crime will indicate to jurors that protected, non-obscene pornographic material is within the sweep of the statute;

(4) The penalty sections of Section 8 are violative of plaintiff's Eighth Amendment rights and constitute a denial of equal protection; and are not based upon any rational reason or classification and are arbitrary and capricious;

(5) The penalty provisions of Section 8 are void for vagueness and are violative of rights secured

under the Fourteenth Amendment to the Constitution of the United States in that the consideration of "willfulness" and "profits" render their application and the amount of penalty uncertain and act as a prior restraint on protected expression because of their draconian potential;

(6) Section 8 denies plaintiff the equal protection of the laws in that it punishes communication and expressive conduct when engaged in for a profit, but does not do so when done for a non-commercial purpose.

21. Pursuant to its plenary powers, this Court may take jurisdiction to determine:

A. Whether H.B. is violative of Article 2, Section 19 of the Constitution of the State of Washington. Article 2, Section 19 provides that no bill shall embrace more than one subject. H.B. 626 is violative of that provision in that it deals with and modifies such diverse subjects as, but not limited to, hotels and motels, theatres, bookstores, prostitution, lewdness, public nuisances, obscene material and the substantive material criminal provisions of RCW 9.68 et seq.

B. Whether section 10 of H.B. 626 is violative of Article 2, Section 1(b) (Amendment 7) of the Constitution of the State of Washington. Article 2, Section 1(b) (Amendment 7) provides for the right of referendum except in the case of emergency legislation. The circumstances surrounding the enactment of H.B. 626 do not justify the inclusion of an emergency clause.

22. Plaintiff herein avers that its rights afforded under the First, Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the Constitution of the United States will be violated by said defendants in both the enactment of a wholly unconstitutional law and in the threatened enforcement thereof, and unless this Court grants the relief prayed for, said plaintiff and others similarly situate, as

well as the interested adult public, will suffer irreparable harms.

23. Plaintiff has no adequate remedy at law, and unless the individual defendants and each of them, are permanently enjoined and restrained and all others acting in concert with them, plaintiff alleges that certain citizens of the state will carry out their announced intent to close plaintiff's establishments in the manner set forth herein.

24. No remedy at law would suffice to protect plaintiff in that a money judgment would in no way reimburse plaintiff for the loss and, indeed, the extinguishment of its constitutional rights to sell and exhibit books, magazines, periodicals, newspapers and motion picture film fare.

25. That the public interest would be served by such injunctive relief in that unless such relief is granted, the public right to purchase books, magazines, periodicals, newspapers and to view motion picture films will have been permanently extinguished.

26. That no substantial harm will befall other parties to this civil action in that a preliminary injunction will simply preserve the *status quo* until such time as all parties to this civil action may be heard by this Court and a determination of the issues involved herein be made by this Court.

27. That the likelihood of plaintiff being ultimately successful in having substantial portions of H.B. 626 declared unconstitutional is great, in that said statute sets up a form of prior restraint, self-censorship and the obliteration of plaintiff's and the general public's First, Fourth, Fifth, Sixth, Eighth and Fourteenth Amendment rights as guaranteed by the United States Constitution, including the taking of plaintiff's property interests without due process of law.

Such forms of censorship and prior restraint are not permitted in a free society governed by a Constitution as drafted by our founding fathers and such overly broad measures have been struck down by the United States Supreme Court which recognizes the chilling effect of such

procedures, and the great danger that exists in tampering with the fragile, but essential, free speech and press provisions of the United States Constitution.

V. RELIEF SOUGHT

28. Plaintiff is entitled to and desires this Court to enter a declaratory judgment, declaring H.B. 626 to be unconstitutional as written or, in the alternative, the major portions thereof to be repugnant to the First, Fourth, Fifth, Sixth, Eighth and/or Fourteenth Amendments to the Constitution of the United States.

Further, plaintiff seeks a preliminary and permanent injunction to prohibit the enforcement by Kenneth Eikenberry, as Attorney General of the State of Washington, Donald C. Brockett, as Spokane County Prosecutor, and James Sloane, as Spokane City Attorney, and their agents, servants and employees, attorneys and/or others acting under the direction and/or control from enforcing the provisions or any one of them of H.B. 626.

WHEREFORE, plaintiff prays:

1. That the defendants be required to answer forthwith, this complaint in conformance with the rules and practices of this Honorable Court.

2. That a declaratory judgment be rendered declaring H.B. 626 to be unconstitutional as written, in whole or in part, and that this Court further declare H.B. 626 to be unconstitutional in its threatened application to the plaintiff.

3. That a preliminary injunction issue from this Court upon hearing restraining the defendant Attorney General, Donald C. Brockett as Spokane Prosecuting Attorney, and Jame Sloane, as Spokane City Attorney, from in any way attempting to enforce the provisions of H.B. 626 as well as their agents, servants, employees and attorneys, and/or others acting under their direction and control pending a hearing and determination on the plaintiff's application for a permanent injunction.

4. That upon final hearing, this Court issue its permanent injunction prohibiting the Attorney General and/or Spokane Prosecuting Attorney and/or the Spokane City Attorney, their agents, servants and attorneys, and/or others in concert with them from enforcing or attempting to enforce the provisions of H.B. 626 in whole or in part.

5. That plaintiff be awarded its reasonable attorney's fees herein pursuant to 42 USCA §1988.

6. And for such other and further relief as may be appropriate under the circumstances of this case.

DATED this 31st day of March, 1982.

Respectfully submitted,
HUBBARD, BURNS & MEYER

BY /s/ _____
Jack R. Burns

OF COUNSEL:

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AFFIDAVIT

STATE OF WASHINGTON }
} ss.
COUNTY OF SPOKANE }

COMES NOW, W. H. Boomer, who, after being duly sworn, did depose and state:

1. That Spokane Arcades, Inc., is a body corporate of the State of Washington, in good standing.

2. That affiant is the President of said corporation, and is authorized to speak on behalf of said corporation.

3. That said corporation is the plaintiff in the within proceedings.

4. That affiant has read the Complaint to which this Affidavit is affixed and asserts that the factual allegations contained therein, are true and correct to the best of his information, knowledge and belief.

5. That the enforcement of H.B. 626 will, if upheld, have the effect of depriving plaintiff of access to the marketplace to exhibit its presumptively protected First Amendment wares of erotic film fare; and further, will deny to interested adults access to such material for their information, appetite, or educational, literary or artistic tastes; as well as subject plaintiff, its agents, servants and employees to confiscatory fines and will chill plaintiff in the exercise of its First Amendment rights of free speech; and will further destroy the property and interest of said corporation in its business locations operated in Spokane, Washington and subject said plaintiff corporation to grievous financial harm.

/s/ _____
W. H. Boomer

SUBSCRIBED AND SWORN to before me this _____ day of _____, 1982.

_____
Notary Public in and for the State of Washington residing at _____

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

NO. C-82-230-RJM

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF PURSUANT TO FEDERAL CIVIL RIGHTS ACT, 42 U.S.C. § 1983

J-R DISTRIBUTORS, INC.,

Plaintiff,

-VS-

KENNETH EIKENBERRY, in his official capacity as Attorney General for the State of Washington; DONALD C. BROCKETT, in his official capacity as Prosecuting Attorney for Spokane County, State of Washington; JAMES SLOAN, in his official capacity as City Attorney for the City of Spokane, Washington; JEFFREY C. SULLIVAN, in his official capacity as Prosecuting Attorney for the County of Yakima, State of Washington; and FRED ANDREWS, in his official capacity as City Attorney for the City of Yakima, Washington,

Defendants.

FIRST CAUSE OF ACTION FOR INJUNCTIVE RELIEF
(42 U.S.C. § 1983)

Nature of Complaint

1. This is an action seeking declaratory and injunctive relief against the threatened enforcement of a newly enacted Washington State statute providing for civil and criminal penalties against the dissemination of obscene matter. A copy of the Act appears in Appendix A and is incorporated as though fully set forth.

Jurisdiction

2. This action arises under the Constitution and laws of the United States, particularly the first and fourteenth amendments to the United States Constitution. The jurisdiction of this Court therefore is invoked under Title 28, U.S.C. § 1331.

3. This is also an action under the Federal Civil Rights Act, Title 42 U.S.C. § 1983, to redress by injunctive relief the deprivation, under color of state law, of rights, privileges and immunities secured to plaintiffs by the Constitution of the United States, and particularly the first and fourteenth amendments thereto. The jurisdiction of this Court therefore is invoked under Title 28 U.S.C. § 1343.

4. This is also a case where plaintiffs are seeking a declaration of their rights under the Constitution and the laws of the United States. Under Title 28, U.S.C. §§ 2201 and 2202, this Court, in a case of actual controversy within its jurisdiction, may declare the rights of plaintiffs seeking such declaration.

Plaintiff

5. Plaintiff J-R Distributors, Inc., is a corporation duly organized and existing under the laws of the State of Washington and owns and operates bookstores which sell books, magazines, newspapers, films and videotapes to the adult public, including material describing and/or depicting sexual activities and themes. The bookstores are located throughout the State of Washington. In this district, plaintiff operates the PayLess Bookstore at West 327 2d Avenue, Spokane, Washington 99204, and Yakima Magazine Center at 18 S. 1st, Yakima, Washington 98901.

Defendants

Defendant Kenneth Eikenberry is the Attorney General for the State of Washington. Defendant Donald C. Brockett is the prosecuting attorney for Spokane County,

State of Washington. Defendant James Sloane is the City Attorney for the City of Spokane, Washington. Defendant Jeffrey C. Sullivan is the prosecuting attorney for the County of Yakima. Defendant Fred Andrews is the City Attorney for the City of Yakima, Washington. Defendants, and each of them, are authorized to bring criminal and/or civil actions pursuant to the legislation here challenged.

The conduct of said defendants, as hereinafter alleged, was performed under color of the laws of the State of Washington and therefore constitute acts of the state within the meaning of the fourteenth amendment to the United States Constitution and Title 42, U.S.C. § 1983.

8. On April 1, 1982, the Governor of the State of Washington signed into law, to take effect immediately, legislation significantly changing the definition of obscene matter and authorizing new and severe penalties, both civil and criminal, for its dissemination. A complete copy of the new legislation is attached hereto as Appendix A.

9. Sections 1 through 6 of the Act add a new chapter in Title 7 RCW which provides, inter alia, that places where "lewd matter" is sold or exhibited constitute a "moral nuisance". "Lewd matter" is defined as synonymous with "obscene matter" and is then further defined in section 1(2) as matter:

> "(a) Which the average person, applying contemporary community standards, would find, when considered as a whole, appeals to the prurient interest; and
>
> (b) Which explicitly depicts or describes patently offensive representations or descriptions of:
>
> (i) Ultimate sexual acts, normal or perverted, actual or simulated; or
>
> (ii) Masturbation, fellatio, cunnilingus, bestiality, excretory functions, or lewd exhibition of the genitals or genital area; or
>
> (iii) Violent or destructive sexual acts, including but not limited to human or animal mutilation, dismemberment, rape or torture; and
>
> (c) Which, when considered as a whole, and in

> the context in which it is used, lacks serious literary, artistic, political, or scientific value."

10. Section 3 authorizes the state attorney general, the prosecuting attorney for the county, or the city attorney for the city, where the alleged moral nuisance is located to bring a civil action in the superior court to impose a civil penalty for the maintenance of such moral nuisance.

11. Section 4 provides that upon a determination that a defendant has with knowledge maintained a moral nuisance, the court shall impose a civil penalty and judgment of an amount as the court may determine shall be appropriate. The Act specifies neither the minimum nor maximum amount of such civil penalty, nor prescribes any criteria for determining the amount, except for providing that:

> "In imposing the civil penalty, the court shall consider the wilfulness of the defendant's conduct and the profits made by the defendant attributable to the moral nuisance."

Section 5 provides that such civil penalties shall be paid into the general treasury of the governmental unit commencing the civil action.

12. Section 6 provides:

> "Nothing in this chapter applies to the circulation of any material by any recognized historical society or museum, any library of any college or university, or to any archive or library under the supervision and control of the state, county, municipality, or other political subdivision."

13. Section 8 of the Act also adds to chapter 9.68 RCW a new section creating the criminal offense of "promoting pornography" and making it a class C felony. A person is guilty of promoting pornography who, for profit making purposes and with knowledge, sells, exhibits, displays or produces any lewd matter as previously defined.

14. The punishment for promoting pornography is that generally prescribed for a class C felony, except special fines are authorized only for promoting pornography

that consist of not less than $5,000 nor more than $50,000 per count. The court is directed, in imposing the criminal penalty, to consider the wilfulness of the defendant's conduct and the profits made by the defendant attributable to the felony.

15. **Unconstitutionality of the New Legislation**

The new obscenity legislation, Appendix A, is unconstitutional on its face and as construed and applied by defendants to plaintiffs herein. The Act abridges the exercise of the freedom of speech and press by plaintiffs and the general public, deprives plaintiffs of due process of law, and denies plaintiffs the equal protection of the laws, all in violation of the first and fourteenth amendments to the United States Constitution.

Irreparable Injury

16. Defendants threaten to enforce the new legislation, Appendix A, against plaintiffs unless they cease the sale and/or exhibition of sexually oriented books, magazines, films, videotapes, and other media of communication which plaintiffs contend are not obscene but, instead, are entitled to the protection of the free speech and press provisions of the Constitution.

17. Unless restrained by this Court, defendants will enforce the new legislation against plaintiffs unless they forego dissemination of media of communication which plaintiffs contend are entitled to the protection of the first amendment, thereby chilling the exercise by plaintiffs of the freedoms of speech and press and denying the general public access to expression entitled to first amendment protection, all to plaintiffs' irreparable injury, for which there is no adequate remedy at law.

SECOND CAUSE OF ACTION FOR DECLARATORY RELIEF

18. Paragraphs 1 through 15 of the complaint are incorporated by this reference as though fully set forth.

19. There is a bona fide dispute between the parties in that plaintiffs allege and defendants deny that the new legislation, Appendix A, violates the free speech and press provisions of the first amendment and the due process and equal protection provisions of the fourteenth amendment to the United States Constitution.

Wherefore plaintiffs pray for judgment as follows:

1. For a temporary restraining order and preliminary and permanent injunctions restraining defendants from enforcing against plaintiffs the provisions of Appendix A.

2. For a declaration that Appendix A is unconstitutional on its face and as construed and applied by defendants to plaintiffs in violation of the free speech and press, due process, and equal protection guarantees contained in the first and fourteenth amendments to the United States Constitution.

3. For attorney fees and costs pursuant to the Civil Rights Attorneys Fees Awards Act of 1976 (42 U.S.C. § 1988), for costs of suit, and for such other and further relief as the Court may deem proper.

CARL MAXEY
THE MAXEY LAW FIRM

By: /s/_____
CARL MAXEY
Attorney for Plaintiff

JOHN H. WESTON
DAVID M. BROWN
BROWN, WESTON & SARNO

By: /s/_____
JOHN H. WESTON
Attorney for Plaintiff

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

No. C-82-231 RJM

MEMORANDUM AND ORDER

AZURE ENTERTAINMENT CORPORATION OF WASHINGTON,
Plaintiff,

vs.

KENNETH EIKENBERRY, in his official capacity as Attorney General for the State of Washington; DONALD C. BROCKETT, in his official capacity as Prosecuting Attorney for Spokane County, State of Washington; and JAMES SLOANE, in his official capacity as City Attorney for the City of Spokane, Washington,
Defendants.

The Washington Legislature recently enacted House Bill 626, an Act relating to pornography and defining penalties for its promotion; the law became effective on April 1, 1982. Plaintiff has brought this action attacking the validity of the statute on a wide range of fronts. It is contended, *inter alia*, that the Act: (1) is overbroad and vague; (2) is more restrictive than the standard mandated by the United States Supreme Court; (3) presents an issue of prior restraint; (4) has a chilling effect on First Amendment freedoms; (5) through the imposition of civil penalties, allows a measure of punishment unfettered by constitutional restraints; and (6) with regard to criminal penalties, constitutes a denial of equal protection.

Defendants, admitting for the most part that this legislation is among the most stringent of its kind in the country and certainly on the cutting edge of the law, point to the overwhelming popular support enjoyed by this and similar past attempts at bringing hard core obscenity under control. They further contend that the statute represents the first realistic opportunity in years for local

government to take an effective role in curtailing pornography in line with prevailing community standards.

At the present stage of proceedings, the ultimate merits of these contentions are not at issue. The sole inquiries before the Court are: (1) whether this is a proper case in which to apply the abstention doctrine; and (2) the propriety of temporarily enjoining enforcement of the Act pending a determination of the legal issues advanced.

Arguments presented in support of abstention are not convincing given the fact that no actions of either a criminal or civil nature are currently pending against the plaintiff. *See 414 Theater Corp, v. Murphy*, 499 F.2d 1155, 1160-61 (2d Cir. 1974). Further, a recent Supreme Court decision suggests that an action brought pursuant to 42 U.S.C. § 1983 may be entertained by a federal court on its own merits independent of the abstention doctrine set forth in *Younger v. Harris*, 401 U.S. 37 (1971). *See generally Wooley v. Maynard*, 430 U.S. 705 (1977).

The test for extraordinary relief is discussed in some detail in *Aleknagik Natives, Ltd. v. Andrus*, 648 F.2d 496 (9th Cir. 1981):

> The effect of *Inglis* was to require the issuance of a preliminary injunction upon a clear showing of either (1) probable success on the merits and possible irreparable injury, or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief.

Id. at 502, construing *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 526 F.2d 86 (9th Cir. 1975).

The facts in the present case militate toward application of the latter test. After full consideration of arguments presented both in brief and oral presentation, I conclude that: (1) plaintiff's objections present substantial questions worthy of detailed study; (2) that if plaintiff should ultimately prevail in whole or in part, it will have suffered substantial and irremediable harm if this Act were to be enforced in the interim; (3) that the potential for harm to defendants can be framed only in terms of a slight delay

and will involve no irremediable damage; and (4) that the public interest will be best served by rendering a final determination of the merits prior to allowing any prosecution under the Act.

The balancing test mandated by *Aleknagik* and *William Inglis*, *supra*, thus swings decidedly in favor of granting a brief stay. Publishers, authors, representatives of unpopular political groups, and, of course, the press in this Nation, have fought long and hard to preserve their freedom of expression from legislative or judicial interference.

The continuing and often bitter conflict between First Amendment values and obscenity legislation is fraught with complexities that lie at the very heart of our constitutional system. It should be emphasized that by granting this preliminary injunction, I have in no way passed upon the substantive merits. It is true that the people of Washington, both as an electorate and through their representatives, overwhelmingly favor a tougher approach to controlling pornography. At the same time, no judge may overlook his sworn duty to ensure that all laws, however popular or unpopular, meet the basic requirements embodied in a Constitution which has served to anchor fundamental freedoms cherished by this Nation over the past two centuries. The provisions of this Order will permit the Court to discharge that duty in an informed and deliberate manner.

Therefore it is

ORDERED that defendants shall bring no prosecutorial action under this legislation until a determination on the merits may be reached pursuant to the schedule in this Order. This will in no way interfere with the various enforcement agencies' authority to pursue any litigation now pending under R.C.W. 9.68.010, or to bring new actions under any other appropriate legislation outside the bounds of HB 626.

IT IS FURTHER ORDERED that plaintiff shall file a brief no later than May 3, 1982, defendants' responsive brief will be due no later than May 18th, and a hearing will be held

on June 7, 1982 at 9:30 a.m. It appears at this time that no evidentiary matters need be considered. Should any of the parties believe otherwise, or should there be any other matters they desire to present to the Court, a telephonic conference will be scheduled upon request.

DONE BY THE COURT this 13th day of April, 1982.

/s/ _____
Robert J. McNichols
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

No. C-82-223-RJM

DEFENDANT'S ANSWER TO PLAINTIFF'S COMPLAINT

SPOKANE ARCADES, INC., a Washington Corporation,
Plaintiff,

v.

THE HONORABLE KENNETH EIKENBERRY, as Attorney General of the State of Washington, in his representative capacity only; DONALD C. BROCKETT, as Prosecuting Attorney of Spokane County, in his representative capacity only; and JAMES SLOANE, Spokane City Attorney, in his representative capacity only,

Defendants.

COMES NOW the defendant, Donald C. Brockett, herein and in answer to the complaint, admits, denies and alleges as follows:

I. JURISDICTION

1. The defendant, Donald C. Brockett, denies the jurisdiction of this court for the reason that this court should abstain from any consideration of this lawsuit because a declaratory judgment action could be brought under state law by virtue of the Revised Code of Washington Chapter 7.24 in fact specifically refers to RCW 7.24.140 and the harmonizing with Federal laws on the subject of declaratory judgments and decrees. Furthermore, there has been no showing by the plaintiff's that the state courts will not apply appropriate federal principles of constitutional law in such a declaratory judgment action.

2. In answering paragraph 2, defendant, Donald C. Brockett, denies that jurisdiction is conferred upon this

court on the basis of 28 USCA § 1343(3), in view of the fact that there has been no deprivation under color of any state law, or statute, of the privileges or immunities secured by the Constitution of the United States with reference to the cause of action pleaded by the plaintiff. In addition, the plaintiff inappropriately pleads a violation of 42 USCA § 1983, in view of the fact that no person under color of any statute or ordinance of any state has caused the plaintiff to be subjected to the deprivation of any rights, privileges or immunities secured by the constitution and, therefore, this portion of the plaintiff's complaint should be stricken. Defendant admits that if the court has jurisdiction under 28 USCA § 2201, the court may only render a declaratory judgment regarding the statute because defendant represents that he will obey the judgment of the court, therefore, any injunction would be inappropriate.

Any other matters pleaded in this particular section of the complaint are denied by virtue of the fact that the defendant Donald C. Brockett, is without information and, therefore, is unable to form a belief with respect to the same.

II. FACTUAL ALLEGATIONS

3. In answering the allegations of paragraph 7 of the complaint, the defendant, Donald C. Brockett, admits that no criminal, quasi-criminal and/or other civil proceeding is pending in any of the State Courts in the State of Washington against the plaintiff, its agents, servants and employees, seeking a penalty for maintaining a moral nuisance or charging the crime of promoting pornography under the provisions of HB 626 as of the date of the filing of this suit. That for these reasons the court should abstain in entertaining this lawsuit on the grounds that it would otherwise interfere in the Federal-State relations with regard to comity. The defendant denies that the statute may be fairly characterized as "flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph and whatever manner and against whomever an effort may be made to apply it."

4. In answering the allegations of paragraph 8, the

defendant denies that the legislation constitutes a prohibited prior restraint. In fact, the procedure set out by the statute does no more than allow a normal civil procedure with the possibility of a judgment, in an amount based on the judgment of the court, at the conclusion of the case. Therefore, the statutory procedure does no more than any other civil statute.

5. In answering the allegations of paragraph 9, the defendant is without information and, therefore, is unable to form a belief and denies the same.

6. In answering the allegations of paragraph 10, the defendant denies that the purpose and scheme of HB 626 is to enable the closing of any bookstore, theatre or arcade offering for sale to the interested adult public, sexually oriented press materials by reason of the imposition of exorbitant fines. Instead, the legislation simply allows a judgment based upon the appropriate findings of the court after the procedure has been concluded.

7. In answering the allegations of paragraphs 11-13, the defendant is without information and, therefore, is unable to form a belief and denies the same.

8. In answering paragraph 14, the defendant denies that the statute is vague, overbroad, constitutes a prior restraint, or is the taking of a property interest without due process of law. Instead, the statute is not impermissibly vague, does not restrain anything, and if a judgment is declared at the conclusion of a case, does not constitute a taking of property interest without due process of law.

9. In answering paragraphs 15-17, the defendant denies that there is any chilling effect to the application of a statute causing the plaintiff to engage in self-censorship because of concern of unlimited fines which might be levied against them. A judgment which may result from a lawsuit does not constitute an unlimited fine.

10. In answering the allegations of paragraph 18, the defendant denies that the plaintiff is entitled to a declaratory relief by virtue of the fact that until there is an "actual case or controversy" this court should not become concerned and rather should abstain so that when an actual case is brought against the plaintiff, the plaintiff may seek a declaratory judgment in the appropriate state court

action, thereby conserving scarce judicial resources.

III. BASIS FOR RELIEF

11. In answering paragraph 19, the defendant denies each and every allegation contained therein.

12. In answering the allegations of paragraph 20, the defendant denies each and every allegation contained therein.

13. In answering the allegations of paragraph 21, the defendant denies that the court may take jurisdiction to determine this matter.

14. In answering the allegations of paragraph 22, the defendant denies that the plaintiff's rights will be violated by the defendant in a threatened enforcement of a statute in violation of the Constitution of the United States.

15. In answering the allegations of paragraph 23, the defendant denies that the plaintiff has no adequate remedy at law, and in fact the adequate remedy at law is under Revised Code of Washington 7.24, a declaratory judgment action in the state courts.

16. In answering the allegations of paragraph 24-27, the defendant is without information and, therefore, is unable to form a belief and denies the same.

IV. RELIEF SOUGHT

17. In answering the allegations of paragraph 28, the defendant denies the plaintiff is entitled to a declaratory judgment, and the court should abstain in favor of the state courts deciding this issue, rather than declaring the statute to be unconstitutional. In addition, it is inappropriate that the court permanently enjoin enforcement of the statute by the defendant. With respect specifically to prayer number 5 in paragraph 28 of the complaint, the defendant moves to strike the request for reasonable attorney's fees pursuant to 42 USCA § 1988, in view of the fact that such an application must be based upon an action under 42 USCA § 1983, which is inappropriate in this case in view of the fact that the plaintiff has not, under color of any statute of any state been subjected to the deprivation of any rights, privileges or immunities secured by the con-

stitution and the laws, since no actions have been brought against the plaintiff under the statute.

V. DEFENSES

By way of further answer, and as matters of affirmative defense, the defendant, Donald C. Brockett, alleges as follows:

18. Defendant alleges as a defense, that this court should abstain from a determination in this matter in the interests of comity and further that the exceptions of *Younger v. Harris*, 401 U.S. 37, 27 L.Ed.2d 669, 91 S.Ct. 746 (1971), and *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 43 L.Ed.2d 482, 95 S.Ct. 1200 (1975), do not warrant a determination on the merits.

Defendant alleges, as a defense, that this court should determine that HB 626 provides for a procedure which is not unconstitutionally vague on its face and the state courts may decide its constitutional application as provided for by *Village of Hoffman Estates v. Flipside, Hoffman Estates*, ___ U.S. ___, 71 L.Ed.2d 362, 102 S.Ct. ___ (1982).

VI. PRAYER

WHEREFORE, defendant, Donald C. Brockett, having fully answered the complaint of plaintiffs on file herein, said defendant prays that:

A. The plaintiff's complaint be dismissed with prejudice;

B. Plaintiff's request for a permanent injunction and declaratory judgment be denied;

C. That defendant be awarded costs herein and that the court grant such other relief as it deems proper.

DATED this 22nd day of April, 1982.

Respectfully submitted,

/s/ _____
Donald C. Brockett
Prosecuting Attorney for
Spokane County

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

No. C-82-230-RJM

DEFENDANT'S ANSWER TO PLAINTIFF'S COMPLAINT

J-R DISTRIBUTORS, INC.,

Plaintiff,

v.

THE HONORABLE KENNETH EIKENBERRY, as Attorney General of the State of Washington, in his representative capacity only; DONALD C. BROCKETT, Prosecuting Attorney of Spokane County, in his representative capacity only; and JAMES SLOANE, Spokane City Attorney, in his representative capacity only; JEFFREY C. SULLIVAN, in his official capacity as Prosecuting Attorney for Yakima County; and FRED ANDREWS in his official Capacity as City Attorney for the City of Yakima,

Defendants.

COMES Now the defendant, Donald C. Brockett, herein and in answer to the complaint, admits, denies and alleges as follows:

I. JURISDICTION

1. The defendant, Donald C. Brockett, denies the jurisdiction of this court for the reason that this court should abstain from any consideration of this lawsuit because a declaratory judgment action could be brought under state law by virtue of the Revised Code of Washington Chapter 7.24 in fact specifically refers to RCW 7.24.140 and the harmonizing with Federal laws on the subject of declaratory judgments and decrees. Furthermore, there has been no showing by the plaintiff's that the state courts will not

apply appropriate federal principles of constitutional law in such a declaratory judgment action.

2. In answering paragraph 2 and 3, defendant, Donald C. Brockett, denies that jurisdiction is conferred upon this court on the basis of 42 USCA § 1983, in view of the fact that no person under color of any statute or ordinance of any state has caused the plaintiff to be subjected to the deprivation of any rights, privileges or immunities secured by the constitution and, therefore, this portion of the plaintiff's complaint should be stricken. In addition, there is no jurisdiction on the basis of 28 USCA § 1343, in view of the fact that there has been no deprivation under color of any state law, or statute of the privileges or immunities secured by the Constitution of the United States with reference to the cause of action pleaded by the plaintiff.

3. In answering paragraph 4, defendant, Donald C. Brockett, denies that the plaintiff is entitled to an injunction on the basis of 28 USCA §§ 2201 and 2202, in view of the fact that the defendant affirmatively states that he will obey any declaratory judgment of this court with reference to the constitutionality of the statute in question, and, therefore, an injunction would be totally inappropriate.

4. In answering the allegations of paragraph 5, with the heading Plaintiff, the defendant is without information and, therefore, is unable to form a belief and denies the same.

5. In answering the allegations of paragraph 6, the defendant admits that the parties are as stated and are authorized to bring criminal and/or civil actions pursuant to the legislation.

6. In answering the allegations of paragraph 7, the defendant denies that any conduct has occurred under color of the laws of the State of Washington which constitute acts of the State within the meaning of the United States Constitution, in view of the fact that no action has been brought against the plaintiff.

7. In answering the allegations of paragraphs 8-14, the defendant admits the allegations contained in said paragraphs.

8. In answering the allegations of paragraph 15, the defendant denies that the statute is unconstitutional on its

face, and furthermore, the plaintiff has inappropriately pleaded that the defendants have construed and applied the statute to the plaintiffs. No action has been brought against the plaintiff on the basis of this statute. The defendant denies each and every allegation contained in paragraph 15.

9. In answering the allegations of paragraphs 16 and 17, the defendant denies each and every allegation contained therein. In fact, there is an adequate remedy at law, by virtue of RCW 7.24 which provides for a declaratory judgment in state court.

10. In answering the allegations paragraph 19, the defendant admits the allegations as contained therein.

II. PLAINTIFF'S PRAYER

11. In answering the allegations of paragraph 1 of the prayer, the defendant denies that the plaintiff is entitled to a preliminary and permanent injunction by virtue of the fact that the defendant states that he will obey the judgment of this court in a declaratory judgment and, therefore, an injunction is totally inappropriate.

12. In answering the allegations of paragraphs 2 and 3 of the prayer, the defendant denies the plaintiff is entitled to a declaratory judgment, and the court should abstain in favor of the state courts deciding this issue, rather than declaring the statute to be unconstitutional. In addition, it is inappropriate that the court permanently enjoin enforcement of the statute by the defendant. With respect specifically to prayer concerning attorney's fees, the defendant moves to strike the request for reasonable attorney's fees pursuant to 42 USCA § 1988, in view of the fact that such an application must be based upon an action under 42 USCA §1983, which is inappropriate in this case because the plaintiff has not, under color of any statute of any state been subjected to the deprivation of any rights, privileges or immunities secured by the constitution and the laws, since no actions have been brought against the plaintiff under the statute.

III. DEFENSES

By way of further answer, and as matters of affirmative defense, the defendant, Donald C. Brockett, alleges as follows:

13. Defendant alleges as a defense, that this court should abstain from a determination in this matter in the interests of comity and further that the exceptions of *Younger v. Harris*, 401 U.S. 37, 27 L.Ed.2d 669, 91 S.Ct. 746 (1971), and *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 43 L.Ed.2d 482, 95 S.Ct. 1200 (1975), do not warrant a determination on the merits.

Defendant alleges, as a defense, that this court should determine that HB 626 provides for a procedure which is not unconstitutionally vague on its face and the state courts may decide its constitutional application as provided for by *Village of Hoffman Estates v. Flipside, Hoffman Estates*, ___ U.S. ___, 71 L.Ed.2d 362, 102 S.Ct. ___ (1982).

IV. DEFENDANT'S PRAYER

WHEREFORE, defendant, Donald C. Brockett, having fully answered the complaint of plaintiffs on file herein, said defendant prays that:

A. The plaintiff's complaint be dismissed with prejudice;

B. Plaintiff's request for a permanent injunction and declaratory judgment be denied;

C. That defendant be awarded costs herein and that the court grant such other relief as it deems proper.

DATED this _____ day of April, 1982.

Respectfully submitted,

/s/ Donald C. Brockett
Prosecuting Attorney for
Spokane County

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

No. C-82-223-RJM

DEFENDANT EIKENBERRY'S ANSWER TO PLAINTIFF'S COMPLAINT

SPOKANE ARCADES, INC., a Washington corporation,
Plaintiff,

v.

THE HONORABLE KENNETH EIKENBERRY, as Attorney General of the State of Washington, in his representative capacity only; DONALD C. BROCKETT, Prosecuting Attorney for Spokane County, in his representative capacity only; and JAMES SLOANE, Spokane City Attorney, in his representative capacity only,
Defendants.

Defendant Kenneth Eikenberry, in his official capacity as Attorney General for the State of Washington, in answer to plaintiff's Complaint for Declaratory and Injunctive Relief admits, denies and alleges as follows:

I.

Defendant denies the allegations of jurisdiction contained in paragraphs 1-2.

II.

Defendant admits that he is the Attorney General for the State of Washington. The defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraphs 4-6 entitle "Parties".

III.

Defendant denies the allegations contained in para-

graphs 7-18 entitled "Factual Allegations" in that plaintiff paraphrases the legislation in question and defendant submits the referenced legislation speaks for itself. Said paragraphs constitute a statement of the ultimate legal conclusions in question before this Court. Further, defendant is without sufficient knowledge to form a belief as to the truth of the factual allegations contained therein.

IV.

Defendant denies paragraphs 19-27 for the reasons stated in paragraph III of defendant's Answer.

V.

Defendant denies paragraph 28 entitled "Relief Sought" for the reason that it constitutes a statement of the ultimate decision to be determined by this Court.

VI.
DEFENSES

Pursuant to F.R.C.P. 12 (b), defendant Eikenberry asserts here the defense that there is a lack of subject matter jurisdiction and requests dismissal of the Complaint on that ground.

VIII.
PRAYER

Having answered, defendant prays that plaintiff's Complaint be dismissed with prejudice; that plaintiff's request for declaratory and injunctive relief be denied; that the Court declare SHB 626 to be constitutional; that defendant be awarded reasonable costs, disbursements, attorneys' fees and such other and further relief as may be appropriate and as the Court may deem proper.

DATED this 21st day of April, 1982.

KENNETH O. EIKENBERRY
Attorney General

/s/ _____
CHRISTINE GREGOIRE
Senior Assistant Attorney General
Attorney for Defendant Eikenberry

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

No. C-82-230-RJM

DEFENDANT EIKENBERRY'S ANSWER TO PLAINTIFF'S COMPLAINT

J-R DISTRIBUTORS, INC.,

Plaintiff,

v.

KENNETH EIKENBERRY, in his capacity as Attorney General of the State of Washington; DONALD C. BROCKETT, in his official capacity as Prosecuting Attorney for Spokane County, State of Washington; and JAMES SLOANE, in his official capacity as City Attorney for the City of Spokane, Washington; JEFFREY C. SULLIVAN, in his official capacity as Prosecuting Attorney for the County of Yakima, State of Washington; and FRED ANDREWS, in his official capacity as City Attorney for the City of Yakima, Washington,

Defendants.

Defendant Kenneth Eikenberry, in his official capacity as Attorney General for the State of Washington, in answer to plaintiff's Complaint for Declaratory and Injunctive Relief admits, denies and alleges as follows:

I.

Defendant denies the allegation contained in paragraph 1 entitled "Nature of Complaint".

II.

Defendant denies the allegations of jurisdiction contained in paragraphs 2-5.

III.

Defendant is without knowledge sufficient to form a belief as to the truth of the allegations contained in the paragraph 5 entitled "Plaintiff".

IV.

Defendant admits that he is the Attorney General for the State of Washington. Defendant denies the allegations contained in the paragraph entitled "Defendants" with reference to defendant Eikenberry. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in the paragraph entitled "Defendants" with reference to any and all other named defendants.

V.

Defendant denies the allegations contained in the paragraphs 8, 9, 10, 11, 13 and 14, entitled "Facts" because plaintiff paraphrases the legislation in question and defendant submits the referenced legislation speaks for itself. Defendant admits paragraph 12 of Facts.

VI.

Defendant denies paragraph 15 entitled "Unconstitutionality of the New Legislation" for the reason that it constitutes a statement of the ultimate legal conclusions in question before this Court.

VII.

Defendant denies the allegations contained in paragraphs 16 and 17 entitled "Irreparable Injury."

VIII.

Defendant redenies and readmits with reference to paragraphs 1 through 15 of plaintiff's Complaint and plaintiff's Second Cause of Action for Declaratory Relief. Defendant Eikenberry admits paragraph 19.

IX.
DEFENSES

Pursuant to F.R.C.P. 12 (b), defendant Eikenberry asserts here the defense that there is a lack of subject matter jurisdiction and requests dismissal of the Complaint on that ground.

X.
PRAYER

Having answered, defendant prays that plaintiff's Complaint be dismissed with prejudice; the plaintiff's request for declaratory and injunctive relief be denied; that the Court declare SHB 626 to be constitutional; that defendant be awarded reasonable costs, disbursements, attorneys' fees and such other and further relief as may be appropriate and as the Court shall deem proper.

DATED this 19th day of April, 1982.

KENNETH O. EIKENBERRY
Attorney General

/s/ _____
CHRISTINE GREGOIRE
Senior Assistant Attorney General
Attorney for Defendant Eikenberry

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

No. C-82-223-RJM

CONSOLIDATED MEMORANDUM OF AUTHORITIES IN OPPOSITION TO PLAINTIFF'S COMPLAINTS FOR DECLARATORY JUDGMENT AND FOR INJUNCTIVE RELIEF

SPOKANE ARCADES, INC., a Washington Corporation,
Plaintiffs,

v.

THE HONORABLE KENNETH EIKENBERRY, as Attorney General of the State of Washington, in his representative capacity only, et al.,
Defendants.

No. C-82-239 RJM

PLAYTIME THEATRES, INC., a Washington Corporation,
Plaintiffs,

v.

THE HONORABLE KENNETH EIKENBERRY, as Attorney General of the State of Washington in his representative capacity only, et al.,
Defendants.

Comes now JAMES C. SLOANE, Corporation Counsel for the City of Spokane, in his representative capacity only, defendant in the above-entitled causes, through his attorney, RICHARD C. ROBINSON, Assistant Corporation Counsel, and submits the follow-

Second, the Court took the term "prurient interest" and placed upon it a specific, narrow interpretation.

Frankly, the words, defined separately, do not mean what the Court has interpreted. Thus, the term "prurient interest" has become a "term of art" or a shorthand for a "shameful or morbid interest in sex, nudity, or excretion." This is not uncommon in law, e.g., "reasonable man" or "clear and present danger".

So, the term "prurient" is properly defined. The term "prurient interest" on the other hand, is defined by case law as something slightly different. The use of both is neither improper nor narrowing.

Further, under Washington rules of statutory construction, both terms ("prurient" and "prurient interest") must be read in the context of the entire statute. *State v. Oyen*, 78 Wn.2d 909, 480 P.2d 766 (1971). Reading the entire statute, it becomes patently clear that the legislature intended to prohibit the sale and/or display of materials, intended to appeal to the "shameful or morbid interest" in sex, nudity, or excretion.

Accordingly, Defendant submits that the definition of "prurient" in the statute does not render the statute overbroad.

B. The use of the phrase "in the context in which it is used" narrows rather than expands the Miller definition.

Defendant submits that the three prong test of *Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973), represents the line between protected and unprotected speech. However, the court certainly would not nor could not prevent a state from edging away from the line into the area of unprotected speech so as to insure that no protected speech is within the

conduct regulated by this sub-section must take place at a place of business. The state's ability to regulate businesses is unquestioned. *See*, e.g., *State v. Smith*, 93 Wn.2d

329, 610 P.2d 869 (1980). Absent a reasonable expectation of privacy, businesses in which lewdness or prostitution is carried on as a regular course of business, are moral nuisances by legislative decree. The section could not be clearer. Sub-section 2(4) is not vague.

Plaintiffs argument regarding "lewdness" is self-defeating. Whether or not plaintiff agrees with the definition, it cannot be said to be vague.

Conclusion

Defendant submits, for the reasons set forth above, that:

(1) Sections 1(8), 1(2)(c), and 1(2)(b) are not unconstitutionally overbroad

(2) Sections 1(3), 2(1), 2(3), and 2(4) are not unconstitutionally vague.

Defendant respectfully urges the court to deny plaintiffs' requested relief.

Respectfully submitted,

JAMES C. SLOANE
Corporation Counsel

By: /s/ _____
Richard C. Robinson
Assistant Corporation Counsel

Attorneys for Defendant
James C. Sloane

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

No. C-82-223-RJM

CONSOLIDATED MEMORANDUM OF AUTHORITIES IN RESPONSE TO PLAINTIFFS' MEMORANDUM

SPOKANE ARCADES, INC., a Washington corporation,

Plaintiff,

v.

THE HONORABLE KENNETH EIKENBERRY, as Attorney General of the State of Washington in his official capacity only; DONALD C. BROCKETT, Prosecuting Attorney for Spokane County, in his representative capacity only; and JAMES SLOANE, Spokane City Attorney, in his representative capacity only,

Defendants.

No. C-82-239-RJM

PLAYTIME THEATRES, INC., a Washington corporation,

Plaintiff,

v.

THE HONORABLE KENNETH EIKENBERRY, as Attorney General of the State of Washington, in his representative capacity only; DONALD C. BROCKETT, Prosecuting Attorney of Spokane County, in his representative capacity only; and JAMES SLOANE, Spokane City Attorney, in his representative capacity only,

Defendants.

No. C-82-240-RJM

JACK R. BURNS, in his representative capacity as

EXECUTOR OF THE ESTATE OF SELOM F. BURNS,
Plaintiff,

v.

THE HONORABLE KENNETH EIKENBERRY, as Attorney General of the State of Washington, in his representative capacity only,
Defendants.

Memorandum Page 1

subsequent to April 13, 1982 defendants by court order could bring no prosecutorial action under the legislation. Defendants have engaged in no *affirmative* conduct to enforce House Bill 626 against plaintiffs. Plaintiffs have not been *deprived* of a constitutional right. Plaintiffs have not established any threats have actually been made. Assuming arguendo that threats have been made, that alone is insufficient. Thus, plaintiffs have failed to meet the requisites for this Court to invoke jurisdiction under

C. HOUSE BILL 626 IS NOT FACIALLY OVERBROAD

D. HOUSE BILL 626 IS NOT UNCONSTITUTIONALLY VAGUE.

Defendant expressly adopts the legal arguments set forth in the brief of defendant Sloane, City Attorney for the City of Spokane with reference to this argument.

The argument is supported by the following:

> This Court has long recognized that a demonstrably overbroad statute or ordinance may deter the legitimate exercise of First Amendment rights. Nonetheless, when considering a facial challenge it is necessary to proceed with caution and restraint, as invalidation may result in unnecessary interference with a state regulatory program. In accommodating those competing interests the court has held that a state statute should not be deemed facially invalid unless it is not readily subject to a narrowing construction by the state courts. *See Dombrowski v. Pfister*, 380 U.S. 479, 497 (1965) and its deterrent effect on legitimate expression is both real and substantial.

See Broadrick v. Oklahoma, 413 U.S. 601, 612-615 (1973).

Erznoznik v. City of Jacksonville, 422 U.S. 205, 216, 95 S.Ct. 2268, 2276 (1975).

It is not necessary to use the exact "few plain examples" set forth in *Miller v. California*, 413 U.S. 15, 25, 93 S.Ct. 2607, 2615 (1973). *People v. O'Neil*, 3223 N.E.2d 7, 8 (1974).

E. HOUSE BILL 626 NEITHER AUTHORIZES A PRIOR RESTRAINT ON PROTECTED EXPRESSION NOR INVIDIOUSLY CHILLS THE EXERCISE OF FIRST AMENDMENT RIGHTS.

Defendant expressly adopts the legal arguments set forth in the brief of defendant Donald Brockett, Spokane Prosecuting

remaining portions of the Act in light of its effect. Further, defendants request this Court consider such effect in light of the aforementioned case law and the "conclusive" presumption of divisibility.

IV.
CONCLUSION

For the foregoing reasons defendant Kenneth O. Eikenberry respectfully requests that plaintiffs' Complaint for Declaratory Judgment and Permanent Injunction be dismissed.

DATED this 18th day of May, 1982.

KENNETH O. EIKENBERRY
Attorney General

/s/ _____
CHRISTINE GREGOIRE
Senior Assistant Attorney General
Attorney for Defendant Eikenberry

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

No. C-82-223-RJM

MEMORANDUM OF AUTHORITIES

SPOKANE ARCADES, INC., a Washington Corporation,
Plaintiff,

v.

THE HONORABLE KENNETH EIKENBERRY, as Attorney General of the State of Washington in his representative capacity only; DONALD C. BROCKETT, Prosecuting Attorney of Spokane County, in his representative capacity only; and JAMES SLOANE, Spokane City Attorney, in his representative capacity only,
Defendants.

and

PLAYTIME THEATRES, INC., a Washington Corporation,
Plaintiff,

v.

THE HONORABLE KENNETH EIKENBERRY, as Attorney General of the State of Washington, in his representative capacity only; DONALD C. BROCKETT, Prosecuting Attorney of Spokane County, in his representative capacity only; and JAMES SLOANE, Spokane City Attorney, in his representative capacity only,
Defendants.

Defendant, Donald C. Brockett, submits this memorandum in support of the validity of Substitute House Bill 626. Defendant, Donald C. Brockett, incorporates by refer-

ence the memoranda submitted by the other party defendants filed this date.

Memorandum of Authorities — 1

> uncertain, but no one can come near it without knowing that he does so, if he thinks, and if he does so it is familiar to the criminal law to make him take the risk." (Citations omitted)

Hamling v. United States, supra, 418 U.S. at 124, quoting *United States v. Wurzbach*, 280 U.S. 396, 399, 74 L.Ed. 508, 50 S.Ct. 167 (1930).

The Act's scienter requirement reduces the impermissible amount of self-censorship suggested by plaintiffs, and postures the acts squarely within the fabric of the constitution. It thus has a very appropriate chilling effect on unprotected obscenity.

Respectfully submitted,

/s/ _____

DONALD C. BROCKETT
Prosecuting Attorney

DAVID A. SARACENO
Deputy Prosecuting Attorney

May 18, 1982

Memorandum of Authorities — 26

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

No. C-82-230-RJM

DEFENDANTS' ANSWER TO PLAINTIFF'S COMPLAINT

J-R DISTRIBUTORS, INC.,

Plaintiff,

v.

THE HONORABLE KENNETH EIKENBERRY, as Attorney General of the State of Washington, in his representative capacity only; DONALD C. BROCKETT, Prosecuting Attorney of Spokane County, in his representative capacity only; and JAMES SLOANE, Spokane City Attorney, in his representative capacity only; JEFFREY C. SULLIVAN, in his official capacity as Prosecuting Attorney for Yakima County; and FRED ANDREWS in his official capacity as City Attorney for the City of Yakima,

Defendants.

COME NOW the defendants, Jeffrey C. Sullivan and Fred Andrews, herein and in answer to the complaint, admit, deny and allege as follows:

I. JURISDICTION

1. The defendants, Jeffrey C. Sullivan and Fred Andrews, deny the jurisdiction of this court for the reason that this court should abstain from any consideration of this lawsuit because a declaratory judgment action could be brought under state law by virtue of the Revised Code of Washington Chapter 7.24 and in fact specifically refers to RCW 7.24.140 and the harmonizing with Federal laws on the subject of declaratory judgments and decrees. Furthermore, there has been no showing by the plaintiff that the state courts will not apply appropriate federal princi-

ples of constitutional law in such a declaratory judgment action.

2. In answering paragraphs 2 and 3, defendants, Jeffrey C. Sullivan and Fred Andrews, deny that jurisdiction is conferred upon this court on the basis of 42 USCA § 1983, in view of the fact that no person under color of any statute or ordinance of any state has caused the plaintiff to be subjected to the deprivation of any rights, privileges or immunities secured by the constitution and, therefore, this portion of the plaintiff's complaint should be stricken. In addition, there is no jurisdiction on the basis of 28 USCA § 1343, in view of the fact that there has been no deprivation under color of any state law, or statute of the privileges or immunities secured by the Constitution of the United States with reference to the cause of action pleaded by the plaintiff.

3. In answering paragraph 4, defendants, Jeffrey C. Sullivan and Fred Andrews, deny that the plaintiff is entitled to an injunction on the basis of 28 USCA §§ 2201 and 2202, in view of the fact that the defendants affirmatively state that they will obey any declaratory judgment of this court with reference to the constitutionality of the statute in question, and, therefore, an injunction would be totally inappropriate.

4. In answering the allegations of paragraph 5, with the heading Plaintiff, the defendants are without information and, therefore, are unable to form a belief and deny the same.

5. In answering the allegations of paragraph 6, the defendants admit that the parties are as stated and are authorized to bring criminal and/or civil actions pursuant to the legislation.

6. In answering the allegations of paragraph 7, the defendants deny that any conduct has occurred under color of the laws of the State of Washington which constitute acts of the State within the meaning of the United States Constitution, in view of the fact that no action has been brought against the plaintiff.

7. In answering the allegations of paragraphs 8-14, the defendants admit the allegations contained in said paragraphs.

8. In answering the allegations of paragraph 15, the defendants deny that the statute is unconstitutional on its face, and furthermore, the plaintiff has inappropriately pleaded that the defendants have construed and applied the statute to the plaintiff. No action has been brought against the plaintiff on the basis of this statute. The defendants deny each and every allegation contained in paragraph 15.

9. In answering the allegations of paragraphs 16 and 17, the defendants deny each and every allegation contained therein. In fact, there is an adequate remedy at law, by virtue of RCW 7.24 which provides for a declaratory judgment in state court.

10. In answering the allegations of paragraph 19, the defendants admit the allegations as contained therein.

II. PLAINTIFF'S PRAYER

11. In answering the allegations of paragraph 1 of the prayer, the defendants deny that the plaintiff is entitled to a preliminary and permanent injunction by virtue of the fact that the defendants state that they will obey the judgment of this court in a declaratory judgment and, there fore, an injunction is totally inappropriate.

12. In answering the allegations of paragraphs 2 and 3 of the prayer, the defendants deny the plaintiff is entitled to a declaratory judgment, and the court should abstain in favor of the state courts deciding this issue, rather than declaring the statute to be unconstitutional. In addition, it is inappropriate that the court permanently enjoin enforcement of the statute by the defendants. With respect specifically to prayer concerning attorney's fees, the defendants move to strike the request for reasonable attorney's fees pursuant to 42 USCA § 1988, in view of the fact that such an application must be based upon an action under 42 USCA § 1983, which is inappropriate in this case because the plaintiff has not, under color of any statute of any state been subjected to the deprivation of any rights, privileges or immunities secured by the constitution and the laws, since no actions have been brought against the plaintiff under the statute.

III. DEFENSES

By way of further answer, and as matters of affirmative defense, the defendants, Jeffrey C. Sullivan and Fred Andrews, allege as follows:

13. Defendants allege as a defense, that this court should abstain from a determination in this matter in the interests of comity and further that the exceptions of *Younger v. Harris*, 401 U.S. 37, 27 L.Ed.2d 669, 91 S.Ct. 746 (1971), and *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 43 L.Ed.2d 482, 95 S.Ct. 1200 (1975), do not warrant a determination on the merits.

Defendants allege, as a defense, that this court should determine that HB 626 provides for a procedure which is not unconstitutionally vague on its face and the state courts may decide its constitutional application as provided for by *Village of Hoffman Estates v. Flipside, Hoffman Estates*, ___ U.S. ___, 71 L.Ed.2d 362, 102 S.Ct. ___ (1982).

IV. DEFENDANTS' PRAYER

WHEREFORE, defendants, Jeffrey C. Sullivan and Fred Andrews, having fully answered the complaint of plaintiff on file herein, said defendants pray that:

A. The plaintiff's complaint be dismissed with prejudice;

B. Plaintiff's request for a permanent injunction and declaratory judgment be denied;

C. That defendants be awarded costs herein and that the court grant such other relief as it deems proper.

DATED the 2nd day of June, 1982.

Respectfully submitted,

/s/ _____

JEFFREY C. SULLIVAN
Prosecuting Attorney for Yakima County, and as Attorney for Fred Andrews, City Attorney

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

No. C-82-223 RJM

SPOKANE ARCADES, INC., a Washington corporation,

Plaintiff,

-VS-

THE HONORABLE KENNETH EIKENBERRY, as Attorney General of the State of Washington, in his representative capacity only; DONALD C. BROCKETT, Prosecuting Attorney of Spokane County, in his representative capacity only; and JAMES SLOANE, Spokane City Attorney, in his representative capacity only,

Defendants.

No. C-82-230 RJM

J-R DISTRIBUTORS, INC.,

Plaintiff,

-VS-

KENNETH EIKENBERRY, in his official capacity as Attorney General for the State of Washington; DONALD C. BROCKETT, in his official capacity as Prosecuting Attorney, Spokane County, State of Washington; JAMES SLOANE, in his official capacity as City Attorney for the City of Spokane, Washington; JEFFERY C. SULLIVAN, in his official capacity as Prosecuting Attorney for the County of Yakima, State of Washington; and FRED ANDREWS, in his official capacity as City Attorney for the City of Yakima, Washington,

Defendants.

No. C-82-231 RJM

AZURE ENTERTAINMENT CORPORATION OF WASHINGTON,

Plaintiff,

-VS-

KENNETH EIKENBERRY, in his official capacity as Attorney General for the State of Washington; DONALD C. BROCKETT, in his official capacity as Prosecuting Attorney for Spokane County, State of Washington; and JAMES SLOANE, in his official capacity as City Attorney for the City of Spokane, Washington

Defendants.

No. C-82-239 RJM

PLAYTIME THEATRES, INC., a Washington corporation,

Plaintiff,

-VS-

THE HONORABLE KENNETH EIKENBERRY, as Attorney General of the State of Washington, in his representative capacity only; DONALD C. BROCKETT, Prosecuting Attorney of Spokane County, in his representative capacity only; and JAMES SLOANE, Spokane City Attorney, in his representative capacity only and NORM MALENG, Prosecuting Attorney of King County in his representative capacity only,

Defendants.

No. C-82-240 RJM

JACK BURNS, in his representative capacity as EXECUTOR OF THE ESTATE OF SELOM F. BURNS,

Plaintiff,

-VS-

THE HONORABLE KENNETH EIKENBERRY, as Attorney General of the State of Washington, in his representative capacity only,

Defendant.

No. C-82-283 RJM

THE AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON:

MADRONA PUBLISHERS, INC.; SUPERIOR PUBLISHING COMPANY; WASHINGTON LIBRARY ASSOCIATION; PACIFIC NORTHWEST BOOKSELLERS ASSOCIATION; MOTION PICTURE EXHIBITORS OF WASHINGTON, ALASKA, AND NORTHERN IDAHO; WASHINGTON STATE COUNCIL OF TEACHERS OF ENGLISH; WASHINGTON LIBRARY MEDIA ASSOCIATION; and THE COMMUNITY COLLEGE LIBRARIAN AND MEDIA SPECIALISTS' ASSOCIATION OF WASHINGTON,

Plaintiffs,

-VS-

THE HONORABLE KENNETH EIKENBERRY, as Attorney General of the State of Washington, in his representative capacity only,

Defendant.

No. C-82-354-RJM

ORDER OF CONSOLIDATION

KUKIO BAY PROPERTIES, INC., a Washington corporation,

Plaintiff,

-VS-

NORM MALENG, Prosecuting Attorney of King County, in his representative capacity only,

Defendant.

Upon motion of the plaintiffs during oral argument and to facilitate judicial management of the future course of this litigation, it is hereby

ORDERED that these actions be consolidated.

DONE BY THE COURT this 2nd day of July, 1982.

/s/ _____

Robert J. McNichols
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

CIVIL ACTION FILE No. C-82-230-RJM

JUDGMENT

J-R DISTRIBUTORS, INC.,

Plaintiff,

vs.

KENNETH EIKENBERRY, in his official capacity as Attorney General, et al.,

Defendants.

This action came on for (hearing) before the Court, Honorable Robert J. McNichols, United States District Judge, presiding, and the issues having been duly (heard) and a decision having been duly rendered.

It is Ordered and Adjudged that judgment is entered denying plaintiff's prayer for injunctive relief; and the action dismissed. Plaintiff's motion for a stay is GRANTED upon condition that application for a stay pending appeal be made to the U.S. Court of Appeals pursuant to Rule 6(i) of the Ninth Circuit Rules of Appellate Procedure. The stay granted by this order shall remain effective until such time as the Court of Appeals either grants or denies the application.

Dated at Spokane, this 26th day of July, 1982.

/s/ _____
Clerk of Court

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
Jul - 2 1984
Phillip B. Winberry
Clerk, U.S. Court of Appeals

No. 82-3501

APPELLEE MALENG'S NOTICE OF APPEAL

PLAYTIME THEATRES, INC., a Washington corporation,
Plaintiff-Appellant,

vs.

THE HONORABLE KENNETH EIKENBERRY, as Attorney General of the State of Washington, in his representative capacity only, DONALD C. BROCKETT, Prosecuting Attorney of Spokane County, in his representative capacity only, and JAMES SLOANE, Spokane City Attorney, in his representative capacity only, NORM MALENG, Prosecuting Attorney of King County, in his representative capacity only,
Defendants-Appellees.

No. 82-3502

CONSOLIDATED WITH NOS. 82-3441, 82-3442, 82-3500, 82-3503, 82-3504

KUKIO BAY PROPERTIES, INC., a Washington corporation,
Plaintiff-Appellant,

vs.

NORM MALENG, Prosecuting Attorney for King County, in his representative capacity only,
Defendant-Appellee.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

NOTICE IS HEREBY GIVEN that Norm Maleng, in his official capacity as Prosecuting Attorney for the County of King, State of Washington, one of the defendant-appellees above named, hereby appeals to the Supreme Court of the United States from the April 6, 1984 order denying petition for rehearing of the 2-1 opinion, filed February 6, 1984, reversing the decision of the United States District Court for the Eastern District of Washington. The decision of the District Court held the challenged Washington State statute to be constitutional.

This appeal is taken pursuant to 28 U.S.C. § 1254(2).

DATED this 28th day of June, 1984.

NORM MALENG
King County Prosecuting Attorney

/s/ _____
CHARLES S. HAMILTON III
Deputy Prosecuting Attorney
Attorneys for Defendant/Appellee

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
Jul - 2 1984
Phillip B. Winberry
Clerk, U.S. Court of Appeals

No. 82-3441

D.C. NO. CV 82-230

J-R DISTRIBUTORS, INC.,

Plaintiff-Appellant,

VS.

KENNETH EIKENBERRY, in his official capacity as Attorney General for the State of Washington; DONALD C. BROCKETT, in his official capacity as Prosecuting Attorney for Spokane County, State of Washington, JAMES SLOANE, in his official capacity as City Attorney for the City of Spokane, Washington, JEFFREY C. SULLIVAN, in his official capacity as Prosecuting Attorney for the County of Yakima, State of Washington, and FRED ANDREWS, in his official capacity as City Attorney for the City of Yakima, Washington,

Defendants-Appellees.

No. 82-3442

D.C. NO. CV 82-231

AZURE ENTERTAINMENT CORPORATION OF WASHINGTON, INC.,

Plaintiff-Appellant,

VS.

KENNETH EIKENBERRY, in his official capacity as

Attorney General for the State of Washington; DONALD C. BROCKETT, in his official capacity as Prosecuting Attorney for Spokane County, State of Washington; and JAMES SLOANE, in his official capacity as City Attorney for the City of Spokane, Washington,

Defendants-Appellees.

No. 82-3500

D.C. NO. CV 82-240

JACK R. BURNS, in his representative capacity as EXECUTOR OF THE ESTATE OF SELOM F. BURNS,

Plaintiff-Appellant,

VS.

THE HONORABLE KENNETH EIKENBERRY, as Attorney General of the State of Washington, in his representative capacity only,

Defendant-Appellee.

No. 82-3501

D.C. NO. CV 82-239

PLAYTIME THEATRES, INC., a Washington Corporation,

Plaintiff-Appellant,

VS.

THE HONORABLE KENNETH EIKENBERRY, as Attorney General of the State of Washington, in his representative capacity only, DONALD C. BROCKETT, Prosecuting Attorney of Spokane County, in his representative capacity only, and JAMES SLOANE, Spokane City Attorney, in his representative capacity only, NORM MALENG, Prosecuting Attorney of King County in his representative capacity only,

Defendants-Appellees.

No. 82-3502

D.C. NO. CV 82-354

KUKIO BAY PROPERTIES, INC., a Washington corporation,

Plaintiff-Appellant,

vs.

NORM MALENG, Prosecuting Attorney of King County, in his representative capacity only,

Defendant-Appellee.

No. 82-3503

D.C. NO. CV 82-223

SPOKANE ARCADES, INC., a Washington corporation,

Plaintiff-Appellant,

vs.

THE HONORABLE KENNETH EIKENBERRY, as Attorney General of the State of Washington, in his representative capacity only, DONALD C. BROCKETT, Prosecuting Attorney of Spokane County, in his representative capacity only, and JAMES SLOANE, Spokane City Attorney, in his representative capacity only,

Defendants-Appellees.

No. 82-3504

D.C. NO. CV 82-283

THE AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON; MADRONA PUBLISHERS, INC., SUPERIOR PUBLISHING COMPANY; WASHINGTON LIBRARY ASSOCIATION; PACIFIC NORTHWEST BOOKSELLERS ASSOCIATION; MOTION PICTURE EXHIBITORS OF WASHINGTON, ALASKA, AND NORTHERN IDAHO; WASHINGTON, STATE COUNCIL OF

TEACHERS OF ENGLISH; WASHINGTON LIBRARY MEDIA ASSOCIATION; AND THE COMMUNITY COLLEGE LIBRARIAN AND MEDIA SPECIALISTS ASSOCIATION OF WASHINGTON,

Plaintiffs-Appellants,

VS.

THE HONORABLE KENNETH EIKENBERRY, as Attorney General of the State of Washington, in his representative capacity only,

Defendant-Appellee.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

NOTICE IS HEREBY GIVEN that James C. Sloane, in his official capacity as City Attorney for the City of Spokane, State of Washington, one of the defendant-appellees above named, hereby appeals to the Supreme Court of the United States from the April 6, 1984, order denying petition for rehearing of the 2-1 opinion, reversing the decision of the United States District Court for the Eastern District of Washington. The decision of the District Court held the challenged Washington State statute to be constitutional.

This appeal is taken pursuant to 28 U.S.C. § 1254(2).

DATED this 27th day of June, 1984.

JAMES C. SLOANE
City Attorney

/s/ _____

RICHARD C. ROBINSON
Assistant City Attorney
Attorneys for Defendant-Appellee
5th Floor Municipal Building
W. 808 Spokane Falls Blvd.
Spokane, WA 99201-3326

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NOS. 82-3441, 82-3442
& 82-3500 thru 82-3504

DC# 82-230 RJM

J-R DISTRIBUTORS, INC., et al.,

Plaintiffs-Appellants,

VS.

KENNETH EIKENBERRY, in his official capacity as Attorney General for the State of Washington, et al.,

Defendants-Appellees.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

NOTICE IS HEREBY GIVEN that Jeffrey C. Sullivan, in his official capacity as Prosecuting Attorney for the County of Yakima, State of Washington, and Fred Andrews, in his official capacity as City Attorney for the City of Yakima, State of Washington, defendants-appellees above named, hereby appeal to the Supreme Court of the United States from the April 6, 1984 order denying petition for rehearing of the 2-1 opinion, filed February 6, 1984, reversing the decision of the United States District Court for the Eastern District of Washington. The decision of the District Court held the challenged Washington State statute to be constitutional.

This appeal is taken pursuant to 28 U.S.C. § 1254(2).

DATED this 3rd day of July, 1984.

/s/ _____

JEFFREY C. SULLIVAN
Yakima County Prosecuting Attorney
Attorney for Defendants/Appellees